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ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, et al.,
Petitioners,
v.
ROYAL DUTCH PETROLEUM CO., et al.,
Respondents.

ASID MOHAMAD, et al.,
Petitioners,
v.
PALESTINIAN AUTHORITY, et al.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Second And District Of Columbia Circuits

BRIEF OF AMICI CURIAE NUREMBERG SCHOLARS OMER BARTOV, MICHAEL J. BAZYLER, DONALD BLOXHAM, LAWRENCE DOUGLAS, HILARY EARL, HON. BRUCE J. EINHORN, RET., DAVID FRASER, SAM GARKAWE, STANLEY A. GOLDMAN, GREGORY S. GORDON, KEVIN JON HELLER, MICHAEL J. KELLY, MATTHEW LIPPMAN, MICHAEL MARRUS, FIONNUALA D. NÍ AOLÁIN, KIM CHRISTIAN PRIEMEL, CHRISTOPH SAFFERLING AND FREDERICK TAYLOR IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici Curiae – listed in the attached Appendix – comprise academicians from three disciplines: law, history, and political science, and have particular knowledge about Nuremberg-era jurisprudence and the international trials that took place in occupied Germany in the aftermath of the Second World War. Given the singular importance of Nuremberg-era jurisprudence in the development of international law,[2] it is particularly crucial that this Court understand how international law was applied to German corporations in the aftermath of Nazi Germany's unconditional surrender in May 1945, and how these corporations were held accountable for violations of international law through multiple sanctions, including dissolution, reparations and other punitive actions. The majority opinion in *Kiobel v. Royal Dutch*

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[1] This brief is submitted pursuant to Supreme Court Rule 37 in support of Petitioners. The parties have consented to the filing of this brief, and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the Amici or their counsel made a monetary contribution to this brief's preparation or submission.

[2] For example, when the International Law Section of the American Bar Association chose to commemorate the 60th anniversary of the Nuremberg trials it called its program "Nuremberg and the Birth of International Law." *Available at* http://apps.americanbar.org/intlaw/nuremberg05.doc.

Petroleum[3] is both factually and legally incorrect in stating that the Nuremberg-era precedent stands for the proposition that corporations are not bound by international law and cannot be held accountable for violations of international law.

Because the analysis of the history of the post-World War II treatment of corporations and organizations under international law may be relevant to the issues raised in the companion case, *Mohamad v. Rajoub*, No. 11-88, Amici submit this brief in that case as well.

SUMMARY OF ARGUMENT

An accurate understanding of the Nuremberg-era jurisprudence and Nuremberg trials is critical to the question of whether corporations and organizations may be held liable under international law. At the various trials conducted by the Allies between 1945 and 1948 at the Palace of Justice in Nuremberg and in other courtrooms throughout occupied Germany only German industrialists, and not the German corporations themselves, were criminally prosecuted. However, the Allied Control Council – the international body governing occupied Germany and issuing Control Council Law No. 10 under which the Nuremberg Military Tribunals were held between 1946 and

[3] 621 F.3d 111 (2d Cir. 2010), *reh'g and reh'g en banc denied*, 642 F.3d 268 (2d Cir. 2011), 642 F.3d 379 (2d Cir. 2011).

1949 – deployed a range of remedial measures to hold juristic persons, including corporations, accountable for violations of international law. Such measures included the dissolution of corporations and the seizure of their assets. Indeed, even before the first Nuremberg trial began, the Allied Control Council had already dissolved a number of German corporations, including most prominently the world's largest chemical corporation *Interessengemeinschaft Farbenindustrie Aktiengesellschaft* ("I.G. Farben"), and seized their assets. As a result, when the international trial of the Farben defendants took place pursuant to Control Council Law No. 10, I.G. Farben had already suffered corporate death under international law pursuant to Control Council Law No. 9.

The entire point of the trials that took place in Courtroom 600 of the Nuremberg Palace of Justice in the American zone, and in courtrooms of the other zones throughout occupied Germany, pursuant to Control Council Law No. 10 was to put natural persons in the dock. It was to show that Nazi leaders and other perpetrators, including German industrialists, could be held criminally responsible under international law regardless of rank or position. In putting only natural persons in the dock, the Allied prosecutors did not intend to create an international law norm that corporations are immune. In fact, the judicial actors at Nuremberg specifically recognized that international law permitted the punishment of corporations, but chose not to judicially prosecute for political and economic reasons. As a result, punishment of

German corporations under international law took place outside of the courtroom. The absence of criminal penalties imposed by an international judicial tribunal against German corporations is more appropriately understood as a choice to sanction such corporations through other international law mechanisms, rather than through a criminal trial – and not as a rejection of the international law authority to hold corporations accountable.

The Control Council operated as a government of occupation, whether under the customary international law principle of *debellatio* or pursuant to the customary international law of occupation, as reflected in the 1907 Hague Regulations provisions. The norms which the Allies applied were anchored in international law. This was as true of the Allied occupation courts, such as the International Military Tribunal and the Nuremberg Military Tribunals, as it was of the Allied Control Council laws and directives. Whether at the Palace of Justice courthouse in Nuremberg or at the Allied Control Council headquarters in the Kammergericht courthouse in Berlin, the Allied Control Council officials and Allied judges were all applying international law.

The erroneous analysis of the *Kiobel* majority concludes that "[n]o corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights." *Kiobel*, 621 F.3d at 148. In reaching this decision, the majority narrowly focused on the criminal trials and ignored other actions taken under

customary international law against corporations and organizations outside the courtroom. The impression left by the majority opinion in *Kiobel* is an historically inaccurate conclusion that what came out of what we label in shorthand as "Nuremberg-era jurisprudence" is a rule that corporations are immune under international law. We respectfully submit that the Founders of Nuremberg and those working with them would have been dismayed by this conclusion.

ARGUMENT

I. NUREMBERG-ERA JURISPRUDENCE SPECIFICALLY IMPOSED SANCTIONS ON NATURAL PERSONS, ORGANIZATIONS AND CORPORATIONS FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW

An understanding of Nuremberg-era jurisprudence and its application to corporations must begin with an understanding of the broad program enacted by the Allies after the occupation of Germany. The Allies' program to govern Germany for the period immediately following the cessation of hostilities contained three components: what to do with the German state upon defeat of the Third Reich; what to do with natural persons and organizations who committed crimes; and what to do with the German economy and its corporations.

With regard to the defeated German Reich, the Allies first occupied the country by dividing it into four zones and, later, as a consequence of the Cold War, into two states: the Federal Republic of Germany, created out of the Western zones, and the German Democratic Republic, created out of the Soviet zone. With regard to the natural persons and organizations, the outline of what to do with the Reich leaders and other perpetrators of "atrocities, massacres and executions" was first set out in the Moscow Declaration of November 1, 1943,[4] while the war was still ongoing, and then confirmed by the London Charter of August 8, 1945, after Nazi Germany's unconditional surrender.[5] The Moscow Declaration left open the decision of what to do with the Reich leaders (including Hitler) until the conclusion of hostilities, and the London

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[4] "At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in ... atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries.... German criminals whose offenses have no particular geographical localization ... will be punished by joint decision of the government of the Allies." Statement of Atrocities, signed by President Roosevelt, Prime Minister Churchill and Premier Stalin, Moscow, November 1, 1943, 3 Bevans 816, 834 Dep't St. Bull. (Nov. 6, 1943).

[5] Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Charter"), 59 Stat. 1544, 82 U.N.T.S. 279 (Aug. 8, 1945).

Charter codified the decision of the Allies to try the so-called major war criminals (now without Hitler, who committed suicide) before an international military tribunal constituted at Nuremberg. The third issue that faced the Allies upon Nazi Germany's defeat was what to do with the major German corporations that had participated in war crimes and other violations of international law.

The Allies created the quadripartite Control Council to translate its policies into law.[6] Under the Control Council was the Coordinating Committee, which was assisted by ten directorates serving as functional specialists for the Coordinating Committee, including the Finance Directorate, Legal Directorate, Reparation Directorate, and Restitutions Directorate.[7] Some writers at the time noted that the directorates functioned "in a manner similar to the Congressional committees

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[6] *See* Agreement on Control Machinery in Germany, November 14, 1944, *available at* http://docs.fdrlibrary.marist.edu/psf/box32/t298f04.html; Eli E. Nobleman, *Quadripartite Military Government Organization and Operations in Germany*, 41 Am. J. Int'l. L. 650, 651 (1947) (stating that the supreme governing machinery for Germany is the Allied Control Authority, composed of the Control Council, the Coordinating Committee, the Control Staff and the Allied Secretariat). The Control Council was composed of Commanders-in-Chief of the Armed Forces of the United States, United Kingdom, Union of Soviet Socialist Republics, and France, and acted "on instructions from their respective governments with respect to all matters affecting Germany as a whole." *Id.* at 651.

[7] *Id.* at 651-2.

in the United States."[8] The Control Council and Coordinating Committee were provided with the "means of legislative action," including laws "on matters of general application," orders to communicate Control Council requirements, and directives used to "communicate policy or administrative decisions of the Control Council."[9] With deterioration in relations with the Soviet Union, the three-power Allied High Commission, comprised of representatives of the United States, the United Kingdom and France, replaced in 1949 the four-power Control Council for the Western occupied zones, and the Federal Republic of Germany began to be created out of the Western zones. Under occupation, related laws were also issued for Germany in the different Allied zones, sometimes known as "zonal legislation."

In Part I, we describe how international law was applied in occupied Germany. As we explain in Section A, the Control Council's actions in governing

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[8] *Id.* at 653.

[9] Control Council Directive No. 10, *Control Council Methods of Legislative Action* (Sept. 2, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 95, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf. Control Council Directive No. 51, which replaced Control Council Directive No. 10, states that "the only legislative acts which may contain penalty clauses are laws and orders." Control Council Directive 51, *Legislative and Other Acts of the Control Council* (Apr. 29, 1947), *reprinted in* 7 Enactments and Approved Paper of the Control Council and Coordinating Committee 27, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdfindex.pdf.

occupied Germany were based on a foundation of customary international law. Section B demonstrates that those international law principles provided the framework for the prosecution of natural persons and organizations. Sections C and D review the legal framework used for the imposition of sanctions on corporations and the means by which that framework was applied to corporations.

Finally, Part II draws on our analysis to demonstrate the errors that underlie the *Kiobel* majority's troubling conclusion that the Nuremberg-era jurisprudence reflects the view that corporations could not be sanctioned for violations of international law.

A. The Allies Were Acting Pursuant to Customary International Law Norms

Scholars to this day differ on whether the customary international law principle of *debellatio* – the law governing complete conquest – was in effect in occupied Germany after unconditional surrender,[10] or whether the Allies were governing according to the customary international law of occupation, as codified in the 1907 Hague Regulations.[11] This debate is not

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[10] *See, e.g.*, Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 113-120 (2011); Eyal Benvenisti, *The International Law of Occupation* 91-96 (2004); Yoran Dinstein, *The International Law of Belligerent Occupation* 33 (2009).

[11] *See, e.g.*, Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws

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relevant to the issue *sub judici*, however, because the Allies, whether acting inside the various courtrooms in occupied Germany or outside the courtroom, aimed to make their actions conform to international law.

The earliest documents creating the Control Council demonstrate the Allies' commitment to international law norms. For example, the Potsdam Agreement made it clear that the "purposes of the occupation of Germany by which the Control Council shall be guided are the complete disarmament and demilitarization of Germany . . . to dissolve all Nazi institutions and to prepare for the eventual reconstruction of German political life . . . and for eventual peaceful cooperation in international life by Germany." Protocol of the Proceedings of the Berlin ("Potsdam") Conference, U.S.-U.K.-U.S.S.R., § II.A.3, Aug. 2, 1945, 3 Bevans 1207, 1220, *available at* http://avalon.law.yale.edu/20th_century/decade17.asp (*hereinafter* "Potsdam Agreement").

The actions of the Control Council both reflected pre-existing customary international law and contributed to the development in the future of such law. Customary international law is to be found in the "practice of states," Sir Robert Jennings & Sir Arthur Watts, 1 *Oppenheim's International Law* 25, 26 (9th

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and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, Art. 46, 2 AJIL Supp. 90 (1908) (Article 43 required that the laws of the occupied country be respected unless the occupier was "absolutely prevented" from doing so).

ed. 1996), which also encompasses activities such as their external conduct with each other, domestic legislation, diplomatic dispatches, internal government memoranda, and ministerial statements. *Id.* at 26. Indeed, judicial decisions are only a secondary source of customary international law, while the practice of states is primary evidence of that law. *See* Statute of the International Court of Justice art. 38(d), Jun. 26, 1945, 59 Stat. 1055, 1060, U.S.T.S. 993 (listing "judicial decisions" as a "subsidiary means for the determination of rules" of international law). Thus, to evaluate the customary international law applicable to corporations that emerged from the post-World War II period, it would be error to rely only on Nuremberg *judicial* actions, while ignoring the large body of state practice by the Allies that demonstrated that corporations were not considered immune under international law.[12]

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[12] Amici are aware of an amicus curiae brief filed by five academics before the Ninth Circuit in *Doe v. Nestlé*, C.A. No. 10-56739 (*Brief Amici Curiae Nuremberg Historians and International Lawyers in Support of Neither Party* (filed Nov. 4, 2011) ("*Nestlé* Amicus Brief")). The *Nestlé* Amicus Brief argues that the laws and directives issued by the Allied Control Council were not "regular law" (*id.* at 29), because these laws and directives "cited reasons of security and similar political reasons [for their issuance], and [so] none of them was remotely 'legal' in character." *Id.* Amici are puzzled by this distinction between (1) "regular law" that supposedly came out of the Nuremberg tribunals and (2) what must be some sort of "irregular law" issued by the Allied Control Council through its laws and directives (and clearly titled as "law"). First, no such distinction was made by the Allies, and nothing in the principles of international law at

(Continued on following page)

Further, the actions taken by the Control Council reflect *opinio juris*. As explained above, Article 38 of the Statute of the International Court of Justice identifies "state practice" as a preeminent source of international law. *Opinio juris* is an important means to be used to determine whether particular conduct by states over time in fact amounts to the "state practice" referenced in Article 38. Not only did the Allies' actions reflect settled practice, but they were carried out because "[t]he States concerned . . . [felt] that they [were] conforming to what amounts to a legal obligation." *The North Sea Continental Shelf Judgment*, 1969 I.C.J. 3, ¶ 77 (Feb. 20). The Allies, as occupiers of Germany between 1945 and 1949, believed that they were acting pursuant to international law and believed they were bound by it in their actions. This is reflected both in the actions taken by the Allies and in the language used in the laws they enacted.

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the Nuremberg trials – or predating Nuremberg or thereafter – limits international law to pronouncements made by judges. Second, the main source relied on by the Amicus Brief, Control Council Law No. 10, the constituent document for the later Nuremberg Trials, derives from the same process: if it was "regular law," then the other Control Council laws were as well.

Amici address this and other points here in anticipation of the possibility that a similar amicus brief may be filed before this Court.

B. The Legal Framework Created by the Allies Provided for Trials Against Natural Persons and Organizations

Prior to the London Charter, there was no international tribunal authorized to prosecute individual persons for international crimes.[13] The London Charter created the International Military Tribunal ("IMT") to try persons and set out the specific international crimes for which these so-called "major war criminals" would be prosecuted: crimes against peace, war crimes, crimes against humanity, and conspiracy.

No pre-war international treaty defined these crimes (save for war crimes) or made natural persons responsible for committing them. As a result, the Allies turned to customary international law. They did so in order to avoid the problem of *nulla crimen sine lege* (no crime without a law), thereby answering the accusation that the defendants in the dock at Nuremberg were being tried *ex post facto*. As Justice Robert Jackson, the chief Nuremberg prosecutor wrote in his Final Report to President Truman:

> We negotiated and concluded an Agreement with the four dominant powers of the earth, signed at London on August 8, 1945, which

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[13] Even though the Allied Powers contemplated putting Kaiser Wilhelm II on trial and included such a provision in the Versailles Treaty, such a trial never took place and an international tribunal was never constituted, although much-criticized trials were held pursuant to German law. Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* 59-60 (2000).

> for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible.[14]

The Allied Control Council, charged with implementing the agreement made in the London Charter, furthered the work of the IMT by enacting Control Council Law No. 10 on December 20, 1945, exactly one month after the trial of the major war criminals had begun.[15] Under Control Council Law No. 10, each

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[14] Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945, at 342 (U.S. Dep't of State, Pub. No. 3080, 1949), *available at* http://www.roberthjackson.org/files/thecenter/files/bibliography/1940s/final-report-to-the-president.pdf. *See also Nuremburg Judgment*, 6 F.R.D. 69, 108-10 (1947) (longstanding recognition that international law imposes duties and liabilities upon persons as well as upon states).

[15] Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (Dec. 20, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 306, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

of the Allies could conduct their own international law trials in zones they occupied by following the explicit international law now set out in the London Charter.

The entire point of the IMT and the subsequent Nuremberg Military Tribunals ("NMT") held by the Americans pursuant to Control Council Law No. 10 was to put persons on trial for crimes committed on behalf of a sovereign state, the German Reich. The references to "individuals" or "persons" in Nuremberg documents were intended to make clear that persons – regardless of their official positions – could be held responsible for state crimes under international law. As Justice Jackson noted in his Opening Address to the IMT:

> The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. . . .[16]

This emphasis on personal as opposed to state liability also contrasted with the view, ultimately reached by the Allied Powers after the First World War, only to hold states responsible under international law.

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[16] Trial of the Major War Criminals Before the International Military Tribunal 98-155 (1947) ("the Blue Set"), *available at* http://avalon.law.yale.edu/subject_menus/imt.asp).

In addition, the London Charter, when it authorized the IMT to designate any group or organization as criminal, specifically enunciated that groups or organizations could violate international law: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." London Charter, Article 9.

The IMT prosecutors, in addition to the 22 people in the dock, also indicted six Nazi organizations: the Reich Cabinet, the *Sturmabteilungen* ("SA"), the German High Command, the Leadership Corps of the Nazi Party, the *Schutzstaffeln* ("SS") with the *Sicherheitsdienst* ("SD") as its integral part, and – separately – the *Geheime Staatspolizei* ("Gestapo"). The Nuremberg judges acquitted the first three organizations and designated the last three as criminal.[17]

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[17] The *Nestlé* Amicus Brief (at 16) argues that the conviction of the organizations was irrelevant because they had already been disbanded, so that declaring guilt was only a means to facilitate the prosecution of members. However, as explained here, both the disbanding and the convictions of the organizations were acts by a multinational body, under international law, targeting the organizations themselves, and thus the recognition that the organizations themselves could be culpable. As one scholar has noted, "[C]orporate and associational criminal liability was seriously explored, and was never rejected as legally unsound. These theories of liability were not adopted, but not because of any legal determination that it was impermissible under international law. Instead, their rejection was the result

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In addition to the condemnation by the international tribunals, Nazi organizations were subjected to other action by the Control Council. In fact, by the time these organizations were declared to be criminal by the IMT, they had been punished under international law because the Allies had already imposed upon them through international law the most severe punishment of all: juridical death through dissolution as well as the confiscation of all their assets.

What is critical is that the Allies carried out this punishment under international law. It was an international treaty that dissolved the Nazi Party and its related entities on September 20, 1945 (following the London Charter on August 8, 1945 and before the IMT trial began on November 20, 1945). Agreement Between Governments of the United Kingdom, United States of America, and Union of Soviet Socialist Republics, and the Provisional Government of the French Republic on Certain Additional Requirements to Be Imposed on Germany Art. 38 (Sept. 20, 1945), *reprinted in* Supplement: Official Documents, 40 Am. J.

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of the wishes of the occupation governments for handling the corporations and the coincidence that the first defendants tried were companies with the structures of Flick, Krupp, and Farben. Corporate or entity liability would have been novel, but no more so than other features of postwar accountability, starting with the idea of an international criminal trial, liability for a head of state, or for crimes against peace, crimes against humanity, or genocide." Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094, 1239 (2009).

Int'l L. 1, 29 (1946) ("The National Socialist German Workers' Party (NSDAP) is completely and finally abolished and declared to be illegal."). This death by dissolution was confirmed by Control Council Law No. 2, which abolished the Nazi Party and affiliated organizations permanently, declared them illegal, and authorized the confiscation of all their property and assets. Control Council Law No. 2, *Providing for the Termination and Liquidation of the Nazi Organizations* (Oct. 10, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 131, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

Nuremberg-era jurisprudence, both inside and outside the courtroom, establishes, therefore, that not only states and natural persons can be liable for international law violations, but also juridical entities.

C. The Legal Framework Created by the Allies Provided for Actions Under International Law Against Corporations

The earliest pronouncement of the Allies at Potsdam and Yalta created a multinational framework for action against corporations complicit in the Nazi-era war crimes. The Yalta and Potsdam Agreements envisioned dismantling Germany's industrial assets, public and private, and creating a system of reparations for states and persons injured during the Nazi period. The Allied plan for post-war Germany was known as the "de" program, usually identified as

demilitarization, decartelization, denazification and democratization. Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* 25 (2001). The program originated in the Potsdam Agreement, which stated: "At the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements." Potsdam Agreement § II.B.12.

As a central component of this program, corporations faced demilitarization, deconcentration, and decartelization, as the Allies sought the elimination or control of all German industry that could be used for military production. There were two related objectives: the elimination of German's war potential[18] and the payment of reparations.[19]

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[18] "In order to eliminate Germany's war potential, the production of arms, ammunition and implements of war as well as all types of aircraft and sea-going ships shall be prohibited and prevented. Production of metals, chemicals, machinery and other items that are directly necessary to a war economy shall be rigidly controlled and restricted to Germany's approved post-war peacetime needs to meet the objectives stated in Paragraph 15. Productive capacity not needed for permitted production shall be removed in accordance with the reparations plan recommended by the Allied Commission on Reparations and approved by the Governments concerned or if not removed shall be destroyed." Potsdam Agreement § II.B.11.

[19] Potsdam Agreement §§ II.B.19, III.

The Control Council was charged with the "inflexible purpose" to "destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the world." Crimea Conference Communiqué (Feb. 2-11, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 2, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf. To meet that goal, the Control Council was instructed to "[e]liminate or control all German industry that could be used for military production; bring all war criminals to justice and swift punishment and exact reparation in kind for the destruction wrought by Germans." *Id.* Its authority to confiscate property and provide for reparations, necessarily emanated from international law and not from local German law.

From the first of its laws, the Control Council made clear that corporations were subject to customary international law as implemented by the Control Council. Control Council Law No. 5 stated the plan to seize all German assets abroad "with the intention thereby of promoting international peace and collective security." The law specifically targeted corporations as well as natural persons, by defining "person" to include "collective" or "juridical" persons or entities.[20]

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[20] "[T]he term person shall include any natural person or collective person or any juridical person or entity under public or

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D. Control Council and Other Allied Laws, Orders and Directives Addressed Corporations

Before issuing Control Council Law No. 10 on December 20, 1945, which set up the Nuremberg international tribunals, the occupation authority issued Control Council Law No. 9 on November 30, 1945. Control Council Law No. 9, *Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945), *reprinted in* 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf. This law specifically directed the dissolution of I.G. Farben and the dispersal of its assets.

Control Council Law No. 9 was based on the customary international law prohibition of crimes against peace that the Allies cited in the London Charter and used to prosecute Nazi leaders for waging aggressive war.[21] The preamble to Control Council Law No. 9,

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private law having legal capacity to acquire, use, control or dispose of property or interests therein." Control Council Law No. 5, *Vesting and Marshalling of German External Sources* (Oct. 30, 1945), *reprinted in* 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

[21] The Kellogg-Briand Pact made the planning and waging of aggressive war both illegal and criminal. Sheldon Glueck, *The Nuernberg Trial and Aggressive War*, 59 Harv. L Rev. 396, 407-12 (1946); Oscar Schacter, *In Defense of International Rules on Use of Force*, 53 U. Chi. L. Rev. 113, 115 n.132 (1986).

titled "*Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof*," stated its clear purpose before ordering the dissolution of what was regarded as the Allies' principal economic enemy: the I.G. Farben industrial concern.

> In order to insure that Germany will never again threaten her neighbors or the peace of the world, and taking into consideration that I.G. Farbenindustrie knowingly and prominently engaged in building up and maintaining the German war potential. . . .[22]

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[22] Control Council Law No. 9, *Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof* Preamble, (Nov. 30, 1945), *reprinted in* 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf. *See also* Memorandum from B. Bernstein to Office of Military Government, United States (Germany), *reprinted in Elimination of German Resources for War: Hearings before a Subcommittee of the Senate Committee on Military Affairs Pursuant to S. Res. 107 and S. Res. 146*, 79th Cong., 1st Sess. (1945) (describing "program adopted by the Allied Powers at Potsdam to strip Germany of all of her external assets in the interest of future world security and to use such assets for the relief and rehabilitation of countries devastated by Germany in her attempt at world conquest. . . . [T]he primary purpose of the Allied Powers in acquiring all German holdings in other countries is to prevent their use by Germany in waging a third world war. . . ."). Disregarding that the dissolution was based both on an exhaustive examination of the facts and, as demonstrated above, on international law, the *Nestlé* Amicus Brief (at 30) asserts that the dissolution of I.G. Farben "was not based on legal criteria."

The punishment imposed by the Allied Control Council upon I.G. Farben was seizure. Article I of Control Council Law No. 9 states: "All plants, properties and assets of any nature situated in Germany which were, on or after 8 May, 1945, owned or controlled by I.G. Farbenindustrie A.G., are hereby seized and the legal title thereto is vested in the Control Council."[23]

This ultimate sanction was as drastic as any that could be imposed on a juridical entity: death through seizure, and was as much a pronouncement of international law as Control Council Law No. 10, which was used to prosecute natural persons and organizations. The extreme sanction of dissolution imposed by Control Council No. 9 is clearly inconsistent with a conclusion that international law at the time of Nuremberg did not consider corporations liable for violations of international law norms.[24]

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[23] *Id.* art. I.

[24] According to the *Nestlé* Amicus Brief, "[a] thorough review of the laws and decrees of [the Control Council] shows almost nothing remotely like a norm of civil or criminal culpability for corporations or other business entities," (*id.* at 28), because of the disparate treatment of various German corporations – dissolving some while "[m]any large and most small firms seemed to have faced no special legal consequences and were largely untouched." (*Id.* at 27). But this is exactly what the Allied prosecutors and the Nuremberg judges did: they prosecuted some persons while ignoring others and convicted some while acquitting others. Under this analysis, neither the Nuremberg tribunals nor, indeed, any system of criminal justice, could be considered to reflect anything "remotely like a norm of civil or criminal liability." In addition, the fact that some of the

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A subsequent directive provided further details about how the decartelization of Farben would take place. Allied High Commission Law No. 35, *Dispersal of Assets of I.G. Farbenindustrie* (Aug. 17, 1950), *reprinted in* Documents on Germany under Occupation, 1945-1954 at 503 (1955). Article 2 of Law No. 35 specified that "[u]ntil the Council of the Allied High Commission has otherwise decided, the British, French and United States I.G. Farben Control Officers shall continue to exercise all rights and powers of seizure and control over the assets subject to this Law *conferred by any Occupation Legislation*." *Id.* (Emphasis added).

Farben was not the only corporation subject to the ultimate sanction of dissolution. For example, the Control Council dissolved and liquidated a number of insurance companies under Control Council Law No. 57. Control Council Law No. 57, *Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front* (Aug. 30, 1947), *reprinted in* 8 Enactments and Approved Paper of the Control Council and Coordinating Committee 1, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf. This law was enacted pursuant to Control Council Law No. 2, which targeted Nazi organizations. Other longstanding insurance companies such as Allianz were dismantled under Military Government

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liquidated corporations later reconstituted themselves does not eliminate the significance of the international action taken to dismantle them in the first place.

Law 52. Military Government Law No. 52, Military Government-Germany, United States Zone, *Blocking and Control of Property* (May 8, 1945), amended version *reprinted in* U.S. Military Government Gazette, Germany, Issue A, at 24 (June 1, 1946). *See* Gerald D. Feldman, *Allianz and the German Insurance Business, 1933-1945* 497-498 (2001).[25]

The Control Council also issued orders to carry out its mandate to seize the assets of other German corporations, both to dissolve and liquidate them and make the assets available for reparations.[26] Control Council Directive No. 39 noted that "the Potsdam decisions call for the liquidation of German war and industrial potential." *Id.* at preamble. The Principles to be followed in the "Rules for Liquidation" of war plants noted that buildings were to be "destroyed,

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[25] The *Nestlé* Amicus Brief (at 18) attempts to limit the significance of Control Council Law No. 57 by stating: "But the Council explained that these companies were all Nazi-front, -controlled, or -affiliated entities, and that they were being treated in effect as extensions of the regime." The *Nestlé* Brief does not mention any of the actions taken under Military Government Law No. 52.

[26] *See* Control Council Directive No. 39, *Liquidation of German War and Industrial Potential* (Oct. 2, 1946), *reprinted in* 5 Enactments and Approved Paper of the Control Council and Coordinating Committee 1, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf, and Control Council Directive No. 47, *Liquidation of German War Research Establishments* (Mar. 27, 1947), *reprinted in* 6 Enactments and Approved Paper of the Control Council and Coordinating Committee 95, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

declared available for reparations, or left for the peace-time economy in cases where they can be used for the peace-time economy. . . ." *Id.* at 3.

Corporations deemed to represent a threat of future international law violations were also subjected to sanctions short of dissolution. For example, identical versions of Law No. 75 were issued by both the Office of the Military Government of the United States and the British zonal authorities. These laws set the framework for the re-distribution of shares of German heavy industrial companies to their owners (after breaking the companies into smaller entities subject to Military Government Laws Nos. 52 and 56). However, the preamble of these parallel documents declared that the Military Government "will not allow the restoration of a pattern of ownership in these industries which would constitute excessive concentration of economic power and will not permit the return to positions of ownership and control of those persons who have been found or may be found to have furthered the aggressive designs of the National Socialist Party." *United Kingdom and United States Military Government Law No. 75: Reorganization of German Coal and Iron and Steel Industries* (Nov. 10, 1948, *reprinted in* Royal Institute of International Affairs (Margaret Carlyle, ed.), *Documents on International Affairs* 637-45 (1952). The language of these documents demonstrates the punitive intention of the Allied deconcentration policy.

In 1950, Allied High Commission Law No. 27 replaced Military Government Law No. 75 in the three

Western Zones and provided for the reorganization of German coal, iron, and steel industries, with the goal of "preventing the development of a war potential. . . ." Allied High Commission Law No. 27, *On the Reorganisation of the German Coal and Steel Industries* (May 16, 1950), Official Gazette of the Allied High Commission for Germany No. 20 299 (May 20, 1950); *see also* Allied Military Government, British Zone, *General Order No. 7 (Pursuant to Military Government Law No. 52): Iron and Steel Undertakings*, Military Government Gazette (Aug. 20, 1946). Article 2 of Law No. 27 provided: "The enterprises listed or described in Schedule A shall be liquidated and reorganized with a view to the elimination of excessive concentrations of economic power which constitute a threat to international peace. . . ." *Id.* Examples of deconcentration pursuant to Law No. 27 were the actions taken against German heavy industry. Large iron and steel conglomerates such as Krupp, Flick, and Vereinigte Stahlwerke AG were forcibly reorganized and broken down into 24 considerably smaller companies. *See* Law No. 27, Schedule A; Isabel Warner, *Steel and Sovereignty: The Deconcentration of the West German Steel Industry, 1949-54* 6-7 (1996).

In the U.S. Zone, elimination of concentrated economic power was explicitly linked to prevention of future violations of international law. Military Government Law No. 56 stated that it was enacted pursuant to the Potsdam Agreement in order to prevent Germany from endangering the safety of her neighbors or again constituting a threat to international

peace. Military Government Law No. 56, *Prohibition of Excessive Concentration of German Economic Power*, Military Government Gazette, U.S. Zone Issue C (Feb. 12, 1947). Identical language was repeated in British Military Government Ordinance No. 78, 16 Military Government Gazette 412 (Feb. 12, 1947). A Liquidation Commission set up by the quadripartite Control Council required that the Dresdner Bank close roughly half of its branches, including all branches east of the Oder-Neisse line. Commerzbank, Dresdner Bank from 1872 to 2009, https://www.commerzbank.com/media/konzern/neue_commerzbank/marke/geschichte/dresdner_bank_history.pdf. *See also War Crimes of the Deutsche Bank and the Dresdner Bank: Office of Military Government (U.S.) Reports* (Christopher Simpson, ed.) 255 (2002). The bank was also broken into ten smaller units.[27]

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[27] In the attempt to show that the Control Council Laws and Directives did not actually reflect "legal norms," the *Nestlé* Amicus Brief argues that laws and directives addressing businesses were "consistent with other CC laws addressing other dangerous entities." *Nestlé* Amicus Brief at 29, citing Control Council Law No. 2 (Termination and Liquidation of Nazi Organizations), Control Council Law No. 34, Dissolution of the Wehrmacht, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-IV.pdf; Control Council Law No. 46, Abolition of the State of Prussia, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-VI.pdf; and Control Council Directive No. 18: Disbandment and Dissolution of the German Armed Forces, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf. But this point supports the view that the Control Council was acting consistently in its implementation of the law.

In yet another example, Alfried Krupp, the sole owner of Krupp, was sentenced to 12 years imprisonment and ordered to forfeit all his property under Control Council Law No. 10, *United States v. Krupp (The Krupp Case)*, 9 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1449, 1449-50 (1950), and the entire Krupp concern was confiscated pursuant to Military Government Law No. 52, and General Order No. 3. Allied Military Government, U.S. Zone, *General Order No. 3 (Pursuant to Military Government Law No. 52): Firma Friedrich Krupp* [General Order No. 3], Military Government Gazette (June 6, 1946).

A series of laws also focused on the denazification of industries and specifically regulated who businesses could hire. For example, Allied Military Government Law No. 8, stated, at Paragraph 1: "It shall be unlawful for any business enterprise to employ any member of the Nazi party or its affiliate organizations in any supervisory or managerial capacity, or otherwise than in ordinary labor." Allied Military Government, U.S. Zone, *Law No. 8: Prohibition of Employment of Members of Nazi Party in Positions in Business Other than Ordinary Labor and for Other Purposes*, Military Government Gazette (Sept. 26, 1945). *Id.* at ¶ 2.

The penalties imposed on these corporations, the distinction in the treatment of natural persons under Control Council Law No. 10 and the treatment of corporations under Control Council Law No. 9 and

the other laws and directives indicate that the principle of non-state liability for violations of international law was not limited to natural persons but applied as well to "juridical" persons such as corporations.

Of course, many of the actions taken to punish the corporations by the Allied Control Council and the Allied High Commission during the occupation were later undercut (or reversed) by the Western Powers as part of their campaign to make West Germany economically strong as a bulwark against further encroachment of Communism. However, the political decisions made during the early years of the Cold War to avoid wiping out particular corporations or to allow those corporations to regroup in other forms does not negate the import of the many actions indicating a recognition that corporations had violated international law and, under that law, could be held liable in multiple ways. As part of that same Cold War agenda, the Western Powers also commuted the sentences of the industrialists convicted at Nuremberg. However, such commutation does not take away from the principle that those industrialists convicted at Nuremberg committed crimes under international law.[28]

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[28] The *Nestlé* Amicus Brief states: "This is not to say that business entities and activities were not covered by various laws in other ways, for they were, as part of larger problems of the manufacture and retention or future capacity to make or hold war materiel and related resources. To that extent, business was thoroughly addressed by the Control Council, but for political

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II. THE MAJORITY IN *KIOBEL* MISINTERPRETED THE CONTEXT AND LEGACY OF THE NUREMBERG TRIALS

The *Kiobel* majority took a different view of Nuremberg-era international law. Relying solely on the absence of criminal prosecutions of corporations before the IMT or NMT, the majority concluded that under Nuremberg-era precedent, corporations could

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and security reasons only, and the authority was not law, but the Potsdam agreement or principles of peace and security." *Id.* p. 28. However, the decision by the Control Council to try persons through its Law No. 10 was also made for "political and security reasons," and its authority was the same legal authority – the Control Council – that issued directives and laws targeting German corporations. It is also strange that the *Nestlé* Amicus Brief does not consider the Potsdam Agreement law, since it is a multinational treaty signed by the United States, the Union of Soviet Socialist Republics and the United Kingdom and is a leading example of international law. And last, the *Nestlé* Amicus Brief states that for laws and directives issued by the "occupation officials" towards German firms to be recognized as "a norm of liability," these must show "(i) consistent adverse treatment of German business, (ii) administered with an intent to punish, and (iii) based on wrongdoing that violated specific legal standards." *Id.* at 24. Curiously, the brief cites no authority for this three-part requirement. Of course, none exists. Rather, the Control Council, as the legislative body of the international community in occupied Germany, through its laws and directives regularly applied norms of liability under international law by taking actions against persons (*i.e.*, Control Council Law No. 10) and corporations (*i.e.*, Control Council Law No. 9 and the other laws and directives cited above), and, through these actions, contributed to the development of new norms of international law.

not be liable for international law violations. In fact, the court of appeals fundamentally misapprehended the lessons of that era. The first error was the failure to recognize how those historic proceedings fit into the context of the entire program, described above, that the Allies created for defeated Germany at the end of the Second World War.

By failing to consider the IMT and post-IMT trials in the context of pre-Nuremberg customary international law, the majority in *Kiobel* made its second error. As noted above, the entire point of the IMT and NMT was to put persons on trial for crimes committed on behalf of a sovereign state, the German Reich. The references to "individuals" or "persons" in Nuremberg documents were intended to make clear that persons – regardless of their official positions – could be held responsible for state crimes under international law. The *Kiobel* majority's assertion that *only* natural persons were prosecuted and faced punishment by the IMT is incorrect. On the terminology itself, the *Kiobel* majority also erred, thus compounding its error that Nuremberg only intended to find human beings responsible for violations of international law. Control Council Law No. 10, upon which the majority relies heavily, uses the word "persons." As discussed above, under Control Council Law No. 5, the term "person" includes juridical persons. The majority also ignored the specific language authorizing the Tribunal to declare groups and organizations as criminal in Article 9 of the London Charter as well

as the indictment and conviction of Nazi organizations.

Nuremberg-era jurisprudence establishes, therefore, that not only states and natural persons can be liable for international law violations, but also juridical entities. The *Kiobel* majority opinion's statement that "[i]t is notable, then, that the London Charter . . . granted the Tribunal jurisdiction over *natural persons only*," *Kiobel*, 621 F.3d at 133, is simply incorrect. That the majority judges would make such a statement is puzzling, to say the least.

The *Kiobel* majority appeared to recognize the problem with this assertion, because in the next paragraph the opinion states that organizations were indeed indicted before the IMT and declared to be criminal organizations. *Id.* at 134. To deal with this problem in its argument, the majority then states: "Such a declaration [by the IMT judges of the criminality of an indicted organization], however, did not result in the organization being punished or having liability assessed against it. Rather, the effect of declaring an organization criminal was merely to facilitate the prosecution of *individuals* who were members of the organization." *Id.*

It appears that the judges, in making this statement, were unaware that, by the time of the tribunal, the Control Council had already destroyed the Nazi organizations under Control Council Law No. 2. To state, therefore, that the IMT judgment declaring the

organization criminal "did not result in the organization being punished or having liability assessed against it," *Kiobel*, 621 F.3d at 134, makes little sense, since these very same organizations were *already* punished and had liability assessed against them through earlier international accords promulgated by the Allies and their occupation authorities.

The conclusion of the *Kiobel* majority that the Nuremberg-era jurisprudence stands for the proposition that corporations could not be sanctioned for violations of customary international law is contrary to the historical record. From the imposition of the ultimate sanction of dissolution to the seizure of assets for reparations, it was understood that corporations could be "made to pay" for their complicity. To use Nuremberg-era jurisprudence as a basis to immunize corporations from liability under international law, we contend, would be contrary to the underlying goals of this jurisprudence. Justice Jackson and those working with him aimed to expand liability under international law and not to truncate it. Subjecting corporations to tort liability for violations of customary international law is consistent with that understanding.

CONCLUSION

For the foregoing reasons, Amici respectfully submit that Nuremberg-era international jurisprudence recognized the liability of corporations and

other organizations for violations of international law. Because the Nuremberg precedent is so important to international law, Amici Nuremberg Scholars request that the Court recognize this principle.

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APPENDIX

LIST OF AMICI CURIAE[1]

Omer Bartov

Professor Bartov is the Chair of the Department of History, John P. Birkelund Distinguished Professor of European History, and Professor of History and Professor of German Studies at Brown University and is the author of seven books and the editor of three volumes on the Holocaust; his work has been translated into several languages. Born in Israel and educated at Tel Aviv University and St. Antony's College, Oxford, Omer Bartov began his scholarly work with research on the Nazi indoctrination of the German Wehrmacht under the Third Reich and the crimes it committed during the war in the Soviet Union. This was the main concern of his books, *The Eastern Front, 1941-1945* (St. Antony's College Series, 2001) and *Hitler's Army: Soldiers, Nazis and War in the Third Reich* (Oxford University Press, 1991). He has also studied the links between World War I and the genocidal policies of World War II, as well as the complex relationship between violence, representation, and identity in the twentieth century. His books *Murder in Our Midst: The Holocaust, Industrial Killing, and Representation* (Oxford University Press, 1996); *Mirrors of Destruction: War, Genocide and Modern Identity* (Oxford University Press, 2000); and *Germany's War and the Holocaust* (Cornell University

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[1] Affiliations are provided for identification purposes only.

Press, 2003) have all been preoccupied with various aspects of these questions.

Michael J. Bazyler

Professor Bazyler is Professor of Law and The "1939" Club Law Scholar in Holocaust and Human Rights Studies at Chapman University School of Law. He is also a research fellow at the Holocaust Education Trust in London and the holder of previous fellowships at the United States Holocaust Memorial Museum and Yad Vashem in Jerusalem (The Holocaust Martyrs' and Heroes' Remembrance Authority of Israel), where he was the holder of the *Baron Friedrich Carl von Oppenheim Chair for the Study of Racism, Antisemitism and the Holocaust*. He is the author of numerous books, book chapters, and articles on the relationship of law and the Holocaust, including *Holocaust Justice: The Battle for Restitution in America's Courts* (New York University Press, 2003) and the forthcoming *Forgotten Trials of the Holocaust* (University of Wisconsin Press).

Donald Bloxham

Professor Bloxham is Professor of Modern History at the School of History, Classics and Archaeology at the University of Edinburgh. He is the author of *The Final Solution: A Genocide* (Oxford University Press, 2009); *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians* (Oxford University Press, 2005); *Genocide*

on Trial: War Crimes Trials and the Formation of Holocaust History and Memory (Oxford University Press, 2001); and co-author, with Tony Kushner, of *The Holocaust: Critical Historical Approaches* (Manchester University Press, 2005). With Ben Flanagan, he is the editor of *Remembering Belsen: Eyewitnesses Recall the Liberation* (Vallentine, Mitchell and Co., 2005). With Mark Levene, he is a series editor of the ten-volume Oxford University Press monograph series entitled *Zones of Violence*, and is an editor, with A. Dirk Moses, of *The Oxford Handbook of Genocide Studies* (Oxford University Press, 2010). Formerly an editor of the *Journal of Holocaust Education*, the Vallentine Mitchell and Co. *Library of Holocaust Testimonies* and the *Holocaust Educational Trust Research Papers*, he is also on the editorial board of four journals – *Holocaust Studies*, *Patterns of Prejudice*, *Zeitschrift für Genozidforschung*, and the *Journal of Genocide Research*. He also serves on the board of foreign correspondents of the journal *900. Per una storia del tempo presente*.

Lawrence Douglas

Professor Douglas is the James J. Grosfeld Professor of Law, Jurisprudence and Social Thought at Amherst College. He holds degrees from Brown (A.B.), Columbia (M.A.), and Yale Law School (J.D.); and has received major fellowships from the Institute for International Education (ITT-Fulbright) and the National Endowment for the Humanities. He is the author of three books: *The Memory of Judgment: Making Law and*

History in the Trials of the Holocaust (Yale University Press, 2001), a widely acclaimed study of war crimes trials; *Sense and Nonsensibility* (Simon and Schuster, 2004), a parodic look at contemporary culture co-authored with Amherst colleague Alexander George; and *The Catastrophist* (Other Press, 2006; Harcourt, 2007), a novel. In addition, he has co-edited ten books on current legal topics. His writings have appeared in numerous journals and magazines including *The Yale Law Journal*, *Representations*, *The New Yorker*, *The New York Times Book Review*, *The Washington Post*, and *The Times Literary Supplement*. He is currently at work on a book about the cultural afterlife of war crimes trials to be published by Princeton University Press.

Hilary Earl

Professor Earl is Associate Professor in the Department of History at Nipissing University in North Bay, Ontario, Canada. She received her Ph.D. in 2002 from University of Toronto in European History, her M.A. in 1992 from University of New Brunswick in European History, and her B.A. in 1989 from University of New Brunswick in History. Dr. Earl's book, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law, and History*, was published in June 2009 with Cambridge University Press. In 2009, she won a Research Achievement award at Nipissing University and won the University's Chancellor's Award for Excellence in Teaching. Additional awards and fellowships include 2005-2006 Nipissing University

Internal Research Grant; 2003 Fellowship Research Seminar: Interpreting Testimony, Center for Advanced Holocaust Studies, United States Holocaust Memorial Museum, Washington, D.C. (co-investigator); 2001-2002 Center for Advanced Holocaust Studies Research Fellowship, United States Holocaust Memorial Museum, Washington, D.C.; 1994-2000 University of Toronto Open Fellowship; 1997-1998 Leonard and Kathleen O'Brien Humanitarian Trust Fellowship; 1997-1998 Joint Initiative for German/European Studies Dissertation Award; and 1994-1998 New Brunswick Women's Doctoral Fellowship.

Hon. Bruce J. Einhorn, Ret.

The Honorable Bruce Einhorn is Adjunct Professor of Law and Director of the Asylum Clinic at Pepperdine University School of Law. He served as a federal immigration judge for seventeen years before retiring in 2007. Prior to his service on the court, he served as a special prosecutor and as Chief of Litigation for the U.S. Department of Justice's Office of Special Investigations. He regularly teaches a course on International Criminal Law.

David Fraser

Professor Fraser is Professor of Law and Social Theory at the University of Nottingham. His primary research focus is on legal systems under National Socialism and law and the Holocaust generally. In 2003, he was a Charles H. Revson Foundation Fellow

at the Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum in Washington, D.C. He is the author of *The Fragility of Law: Constitutional Patriotism and the Jews of Belgium, 1940-1945* (Routledge, 2009), winner of the Hart Socio-Legal Book Prize, 2010, awarded for the most outstanding piece of socio-legal scholarship; *Law After Auschwitz: Towards A Jurisprudence of the Holocaust* (Carolina Academic Press, 2005); and *The Jews of the Channel Islands and the Rule of Law, 1940-1945* (Sussex Academic Press, 2000).

Sam Garkawe

Sam Garkawe is an Associate Professor at the School of Law and Justice at Southern Cross University in New South Wales, Australia. He has two Masters of Laws degrees from London University and Sydney University, and is admitted to the State Bar of California. Sam has published widely in the field of victimology, including issues concerning the role of victims in international justice mechanisms, such as the International Criminal Court and the South African Truth and Reconciliation Commission, and more recently on the need for a binding International Convention in support of victims. His published work includes a chapter entitled "The role and rights of victims at the Nuremberg International Military Tribunal" in the book *The Nuremburg Trials: international criminal law since 1945: 60th anniversary international conference*. He presently teaches victimology, human rights, criminal law and procedure,

and international criminal law. In July 2003 he was appointed to the United Nations Liaison Committee of World Society of Victimology (WSV), and in this capacity he has represented the WSV at United Nations Crime Congresses in Bangkok, Thailand (2005) and Salvador, Brazil (2010). Sam is a life member of the WSV and in 2009 was elected to its Executive Committee.

Stanley A. Goldman

Professor Goldman is Professor of Law and Director of the Center for the Study of Law and Genocide at Loyola Law School. There his courses have included Law and Genocide, Criminal Law, Evidence and Criminal Procedure, and Legal Ethics. Prior to becoming a full-time professor at Loyola he spent approximately eight years in the office of the Los Angeles County Public Defender. From 1996-2006, he was Legal Editor and then Legal Affairs Editor for Fox News Channel. Professor Goldman has appeared as a legal analyst for numerous media outlets including CBS National Network Radio and CNN.

Gregory S. Gordon

Professor Gordon is the Director of the University of North Dakota Center for Human Rights and Genocide Studies and teaches human rights and international and criminal law at the University of North Dakota School of Law. Before joining the legal academy, he was a Senior Trial Attorney for the U.S.

Department of Justice's Office of Special Investigations. He previously worked with the Office of the Prosecutor for the International Criminal Tribunal for Rwanda, where he served as Legal Officer and Deputy Team Leader for the landmark media cases, the first international post-Nuremberg prosecutions of radio and print media executives for incitement to genocide. His scholarship has been published in leading international publications and focuses on both the substantive and procedural aspects of human rights and international criminal law.

Kevin Jon Heller

Dr. Kevin Jon Heller is currently a Senior Lecturer at Melbourne Law School, where he teaches international criminal law, comparative criminal law, and criminal law. He holds a Ph.D. in law from Leiden University and a J.D. with distinction from Stanford Law School. His academic writing has appeared in a variety of leading academic journals, including the *European Journal of International Law*, the *American Journal of International Law*, the *Journal of International Criminal Justice*, the *Harvard International Law Journal*, the *Michigan Law Review*, the *Leiden Journal of International Law*, and the *Journal of Criminal Law & Criminology*. In February 2011, Stanford University Press published his edited book *The Handbook of Comparative Criminal Law*, and in June 2011 Oxford University Press published his book *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, the first

book-length study of the twelve trials held in the American occupation zone between 1946 and 1949. He has also been involved in the International Criminal Court's negotiations over the crime of aggression, served as Human Rights Watch's external legal advisor on the trial of Saddam Hussein, and was one of Radovan Karadzic's formally-appointed legal associates from December 2008 until February 2011.

Michael J. Kelly

Professor Kelly is Professor of Law and Associate Dean for International Programs and Faculty Research at Creighton University School of Law. He has served as chair of the Association of American Law Schools (AALS) Section on National Security Law and is president of the U.S. National Chapter of L'Association International du Droit Pénal, a Paris-based society of international criminal law scholars, judges, and attorneys founded in 1924 that enjoys consultative status with the United Nations. His research and teaching focuses on the fields of international and comparative law and Native American law. He is the author and co-author of four books and over thirty articles and book chapters in these areas. He has taught International Criminal Law for over a decade.

Matthew Lippman

Professor Lippman is Professor of Criminology, Law, and Justice at the University of Illinois at Chicago, where he is a Master Teacher in the College of Liberal

Arts and Sciences. He is also an Adjunct Professor of Law at John Marshall Law School in Chicago. Professor Lippman is a leading expert on the law of genocide and has written extensively on the Nuremberg trials and on other post-World War II prosecutions of Nazi war criminals. He teaches courses on international criminal law and genocide and the Holocaust. His most recent work centers on the legal profession in Nazi Germany, the extradition of Nazi war criminals, and on the Genocide Convention. He recently completed a series of ten articles which review the post-World War II trials of German industrialists, lawyers, doctors, concentration camp officials, diplomats, and military leaders. Dr. Lippman is also one of the leading legal writers on genocide and the 1948 Convention on the Punishment and Prevention of the Crime of Genocide. He has been cited or excerpted in leading international law texts and in various texts on criminal procedure as well as by the International Court of Justice and other international tribunals.

Michael Marrus

Professor Marrus is the Chancellor Rose and Ray Wolfe Professor Emeritus of Holocaust Studies and a Fellow of Massey College. A Fellow of the Royal Society of Canada and a member of the Order of Canada, he received an M.A. and Ph.D. from the University of California at Berkeley – and more recently, a Master of Studies in Law at the University of Toronto. He has been a visiting fellow of St. Antony's College, Oxford; the Institute for Advanced Studies of

the Hebrew University of Jerusalem; and has taught as a visiting professor at the University of California, Los Angeles and the University of Cape Town, South Africa. His recent teaching, both in Law and History, focuses on political trials. He is the author of several books, including *Vichy France and the Jews* (with Robert Paxton) (Basic Books, 1981); *The Unwanted: European Refugees in the Twentieth Century* (Oxford University Press, 1985); *The Holocaust in History* (New American Library, 1989); and *The Nuremberg War Crimes Trial, 1945-46* (Bedford Books, 1997). He has recently published a book on the Holocaust-era restitution campaign of the 1990s, entitled *Some Measure of Justice* (University of Wisconsin Press, 2009).

Fionnuala D. Ní Aoláin

Professor Ní Aoláin is concurrently the Dorsey & Whitney Chair in Law at the University of Minnesota Law School and a Professor of Law at the University of Ulster's Transitional Justice Institute in Belfast, Northern Ireland. In 2008, she was invited to participate as an expert in an Expert Seminar organized by the Working Group "Protecting human rights while countering terrorism" of the United Nations Counter-Terrorism Implementation Task Force. She has previously been Visiting Scholar at Harvard Law School (1993-94); Visiting Professor at the School of International and Public Affairs, Columbia University (1996-2000); Associate Professor of Law at the Hebrew University in Jerusalem, Israel (1997-99);

and Visiting Fellow at Princeton University (2001-02). Her most recent book, *Law in Times of Crisis* (Cambridge University Press, 2006), was awarded the American Society of International Law's preeminent prize in 2007: the Certificate of Merit for creative scholarship. She is also the author of "Sex-Based Violence and the Holocaust – A Re-evaluation of Harms and Rights in International Law," 12 *Yale J.L. & Feminism* 43 (2000). She was a representative of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia at domestic war crimes trials in Bosnia (1996-97). In 2003, she was appointed by the Secretary-General of the United Nations as Special Expert on promoting gender equality in times of conflict and peace-making. She has been nominated twice by the Irish government to the European Court of Human Rights, in 2004 and 2007, the first woman and the first academic lawyer to be thus nominated. She was appointed by the Irish Minister of Justice to the Irish Human Rights Commission in 2000 and served until 2005.

Kim Christian Priemel

Dr. Kim Christian Priemel is Assistant Professor at the Institute of History at Humboldt University in Berlin, Germany, and currently a visiting scholar at the Center for European Studies at Harvard University. He studied History, Law, and English Literature at the Universities of St. Andrews and Freiburg where he received an M.A. and Ph.D. He has been a visiting fellow of Wolfson College, Cambridge, and a visiting

scholar at the Center for History and Economics, Kings College, Cambridge. He is the author and editor of several books, including *Flick. Eine Konzerngeschichte vom Kaiserreich bis zur Bundesrepublik* (Wallstein, 2007), *Unearthing the Subsequent Nuremberg Trials. Transitional Justice, Trial Narratives, and Historiography* (with Alexa Stiller) (Berghahn Books, forthcoming 2012); *N M T.* Die Nürnberger Militärtribunale zwischen Geschichte, Gerechtigkeit und Rechtsschöpfung (with Alexa Stiller) (Hamburger Edition, 2012); Two Nuremberg-related articles will be published next year: "'A Story of Betrayal.' Conceptualizing Variants of Capitalism in the Nuremberg War Crimes Trials," *Journal of Modern History* (2012), and: "Der Sonderweg vor Gericht. Angewandte Geschichte im Nürnberger Krupp-Prozeß," *Historische Zeitschrift* (2012).

Christoph Safferling

Professor Safferling is professor of criminal law, criminal procedure, international criminal law and public international law at the Philipps-University of Marburg, in Marburg, Germany. At the University of Marburg, he also serves as the Director of the International Research and Documentation Center for War Crimes Trials. He is also the Whitney R. Harris International Law Fellow of the Jackson Center, Jamestown, N.Y. and a member of the advisory board to the city of Nuremberg regarding the "Memorial Nuremberg Trials." Alongside several articles in the fields of criminal law, international law and human rights law, he has published *Towards an International*

Criminal Procedure (Oxford University Press, 2003), *The Nuremberg Trials: International Criminal Law Since 1945* (Saur, 2006) and edited the German translation of Whitney Harris' *Tyranny on Trial [Tyrannen vor Gericht]* (BWV 2009).

Frederick Taylor

Frederick Taylor is a fellow of the Royal Historical Society in England. Most recently, he is the author of *Exorcising Hitler: The Occupation and Denazification of Germany* (Bloomsbury Press, 2011). He is also the author of the acclaimed bestsellers *Dresden* and *The Berlin Wall*, both of which have appeared in many languages, and he also edited and translated *The Goebbels Diaries 1939-1941*. He studied history and modern languages at Oxford University and did post-graduate work at Sussex University. He has lectured all over the world and has appeared in several major documentaries, including most recently *The Rise and Fall of the Berlin Wall* and *The Wall: A World Divided*.